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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-587

OTIS R. BOWEN, AS GOVERNOR OF THE STATE OF INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 74-588

THE SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 74-605

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2–A33)[1] is reported at 503 F. 2d 68. The opinion of the district court (Pet. App. A35–A103) is reported at 368 F. Supp. 1191.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1974, and timely petitions for rehearing were denied on October 3, 1974 (Pet. App. A34). The petitions for writs of certiorari in Nos. 74–587 and 74–588 were filed on November 15, 1974. The petition for a writ of certiorari in No. 74–605 was filed in November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in remanding this school desegregation case to the district court to determine, in light of this Court's decision in *Milliken* v. *Bradley*, whether the constitutional violations found by the district court warrant an inter-district remedy.

2. Whether the court of appeals erred in sustaining rulings of the district court appointing commissioners to develop and submit acceptable desegregation plans when the School Board failed to do so, directing the Board to seek available federal financial assistance for operating the school system under court-ordered desegregation plans, precluding further litigation by newly added parties concerning the existence of *de jure* segregation in the Indianapolis school system,

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[1] "Pet. App." refers to the joint appendix to the petitions for writs of certiorari.

and excluding evidence discounting the educational and sociological value of school desegregation.

STATEMENT

On May 31, 1968, the United States, pursuant to 42 U.S.C. 2000c–6(a) and (b), filed a complaint in the United States District Court for the Southern District of Indiana charging the Board of School Commissioners of the City of Indianapolis with racial discrimination in the assignment of faculty and students in the Indianapolis school system (Pet. App. A2–A3). After a trial on the merits, the district court ruled that the Indianapolis School Board was operating a *de jure* segregated school system (*id.* at A157–A209). The court enjoined the Board from discriminating on the basis of race and ordered it to take certain interim affirmative steps toward the establishment of a non-discriminatory school system (*id.* at A207–A209).

The court did not order long-range relief. It found that desegregation solely within the boundaries of the Indianapolis Public School System would be a "simplistic solution" that "won't work," because of the danger that the "tipping point [would] be reached and passed beyond reprieve" (*id.* at A203).[2] The district court concluded that the "tipping point" problem would be alleviated if the city schools of Indianapolis

[2] The court stated that "when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible" (Pet. App. A199). The percentage of Negro pupils in the Indianapolis school system had increased from 20 per cent in 1954 to 36 per cent at the time of the district court decision (*id.* at A185).

were consolidated with surrounding school systems in the metropolitan area (*id.* at A204). It therefore ordered the United States "to prepare and file appropriate pleadings to secure the joinder herein as parties defendant of the necessary municipal corporations and school corporations" (*id.* at A206) to litigate specified questions relating to the court's power to order relief on a metropolitan basis (*id.* at A202–A206).

On motion of the United States, all school corporation in Marion County (eight townships and two city corporations) were added as parties defendant (*id.* at A5). A few days later, the court permitted two black students (the Buckley plaintiffs) to intervene as plaintiffs and as representatives of a class consisting of "all Negro school age children residing in the area served by" the Indianapolis school board (*id.* at A5–A6). The intervening plaintiffs joined as parties defendant the Governor and Attorney General of Indiana, the State Superintendent of Public Instruction, the State Board of Education, and 19 school corporations (including the 10 within Marion County that had already been joined on motion of the United States, plus nine other school corporations in the adjoining counties of Boone, Hamilton, Hancock, Johnson, Morgan, and Hendricks) (*id.* at A6).

The amended complaint of the intervening plaintiffs alleged that the Indiana statute establishing a consolidated metropolitan government consisting of the City of Indianapolis and Marion County, the so-called Uni-Gov Act,[3] is unconstitutional, because the "purpose and

[3] The Uni-Gov Act, Indiana Code, 1971, §§ 18-4-4-1, *et seq.*, provides that the Indianapolis school district is not affected

effect" of the Act's exclusion of school systems from the consolidation "are to perpetuate segregation on the basis of race and to inhibit desegregation in the public schools and school systems of Marion County" (*id.* at A152). The complaint also alleged that state and local authorities had "effected racial segregation and discrimination in the operation of public schools and school systems serving Marion County * * * and the Indianapolis metropolitan area" (*ibid.*). It sought an order consolidating the defendant school systems or granting some other form of inter-system relief (*id.* at A154–A155).

The district court thereafter ordered the development and submission of comprehensive plans for the desegregation of the Indianapolis Public School System (see *id.* at A6–A7). In response, the Board submitted a plan that the district court later rejected on the ground that the plan would have "result[ed] in no change whatever in the existing segregation" (*id.* at A117).

The court subsequently issued a memorandum of decision on the remedy phase of the case (*id.* at A35–A82). The decision, as summarized by the court of appeals (*id.* at A7–A8), concluded:

> (1) desegregation promising a reasonable degree of permanence could not be accomplished

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by the expansion of the city boundaries. This leaves the Indianapolis Public Schools confined to the central core of the new Uni-Gov, where it is surrounded by eight township school systems and two city school corporations (Beech Grove and Speedway City), all operating independently within the new unified city of Indianapolis and within Marion County (Pet. App. A5). See Indiana Code, 1971, § 18-4-3-14.

within the present boundaries of the Indianapolis school district; (2) the State of Indiana, its officials and agencies, had by various acts and omissions promoted segregation and inhibited desegregation within the Indianapolis district, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has a continuing affirmative duty to desegregate the Indianapolis system; (3) the system could be effectively desegregated either by combining its territory with all or part of the territory served by the 19 surrounding school corporations in and adjacent to Marion County into a metropolitan system and then reassigning students within the expanded system or by transferring black students from the Indianapolis district to the 19 others, either on a one-way or exchange basis; and (4) the state, through its General Assembly, should first be afforded the opportunity to select its own plan; but if it failed to do so, the court would promulgate a plan.

As interim relief, the court ordered that the Indianapolis Board rearrange its student assignments for the 1973–1974 school year so that each elementary school would have a minimum black enrollment of approximately 15 percent (*id.* at A10). After a further evidentiary hearing, the court found that an interim plan submitted by the Board was inadequate. The court found that "the Board is unable or unwilling to comply with the orders of this Court" (*id.* at A106), and it therefore appointed two commissioners "to draw up interim and final plans for the

desegregation of the Indianapolis Public School System" (*id.* at A107). In addition, the court ordered the Board "to proceed forthwith to make the necessary application or applications for Federal funds in all of the various categories available to school systems operating under orders of desegregation" (*id.* at A110). The court thereafter approved an interim plan submitted by the commissioners (*id.* at A111–A115).

The court of appeals affirmed the district court's findings, conclusions, and orders in all respects except insofar as they related to metropolitan-wide final relief. On the issue of inter-district relief, the court of appeals ruled (*id.* at A32–A33; footnotes omitted):

> In accordance with *Milliken* v. *Bradley*, —— U.S. —— (July 25, 1974), we reverse the district court's findings, conclusions, orders, and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries; insofar as they pertain to a remedy within the boundaries of Uni-Gov, we vacate those rulings and remand for further proceedings consistent with that decision. The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of [the Indianapolis school system] boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*.

ARGUMENT

1. The primary contention in each of the three petitions is that the court of appeals should have reversed outright the district court's decision with regard to a metropolitan-wide remedy rather than remanding the

case to the district court for further proceedings. Petitioners rely on this Court's decision in *Milliken* v. *Bradley,* No. 73–434, decided July 25, 1974, which held that inter-district remedial action is unwarranted unless it is "shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district" (slip op. 25). In the present case, however, the court of appeals did not order an inter-district remedy. Instead, it rejected the district court's plan of inter-district relief, reversed outright the portion of the remedy requiring inter-district relief outside the boundaries of Uni-Gov, and explicitly instructed the district court on remand to consider whether an inter-district remedy within the boundaries of Uni-Gov is appropriate in light of *Milliken* v. *Bradley.* Review of the court's decision at this time would be premature.

Petitioners contend that the district court's finding in this case that the suburban school districts were not operating *de jure* segregated schools forecloses the possibility of interdistrict relief and that no useful purpose could be served by remanding this case to the district court for further proceedings. But, since the district court had explicitly declined to consider whether the Uni-Gov statute had the purpose or effect of promoting segregation (Pet. App. A65), it was appropriate in light of *Milliken* for the court of appeals to remand the case to permit consideration of the purpose and effect of that statute.

The history of the school district boundaries in the present case differs from that in *Milliken,* where

there was no suggestion that boundaries "were established for the purpose of creating, maintaining or perpetuating segregation of races" (slip op. 29). Here, the district court found that, under the common law of Indiana, "boundaries of a school district and of a civil city were coterminous" (see Pet. App. A4)[4] and that the Uni-Gov Act—which consolidated for most purposes the civil governments of the City of Indianapolis and of Marion County into a unified, metropolitan government—expressly provides that the Indianapolis school district would *not* be affected by the expansion of the city. Indiana Code, 1971, § 18–4–3–14.

The district court did not have available at the time of its ruling the guidance of this Court's opinion in *Milliken*. On remand, it will have the opportunity to make further findings in light of that opinion, to consider both the similarities and differences between this case and *Milliken*, and to apply the principles of that decision to the Indianapolis situation. Only after such consideration by the district court is completed will further appellate review be appropriate.

2. The petitions raise several other issues that do not require extended discussion. In No. 74–605, the School Board contends (Pet. 25–29) that it was error

[4] This common law rule was recognized by statute in 1931. Indiana Code, 1971, § 20–3–11–1. Statutes enacted in 1961 and 1969 (Indiana Code, 1971, §§ 20–3–14–1, 20–3–14–9, 20–3–14–10) provided that, if the boundaries of Indianapolis were extended, those of its school district could likewise be extended. The school district extension, however, was subject to a separate remonstrance or could be vetoed b a specified percentage of persons.

for the district court to order it to seek federal funds that are available to school systems operating under desegregation orders. The order, however, was properly within the discretion of the district court. In *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 233, this Court held that a district court has the power to order local authorities to levy taxes in order to operate a public school system without discrimination. It follows that the court may in appropriate circumstances require a school board to take the less burdensome step of making use of available funds as part of an effort to rid the public schools of racial discrimination.

Similar orders have been issued in other school desegregation cases. For example, in *Oliver* v. *Kalamazoo Board of Education*, 368 *F. Supp.* 143, 205 (W.D. Mich.), affirmed, Nos. 74–1104 and 74–1105, December 9, 1974 (C.A. 6), the district court ordered the school board "to apply to the federal government for such financial assistance as may be available to aid the Board in executing the present order of this Court."[5] It is the responsibility of the district court to ensure the implementation of a workable plan for desegregation. See *Brown* v. *Board of Education*, 349 U.S. 294, 299. The Board has not shown that the federal funds would not be useful for that purpose or that it would suffer any actual harm from using

[5] See also *Whittenberg* v. *Greenville County School District*, 298 F. Supp. 784 (D.S.C.); *United States* v. *State of Texas*, 342 F. Supp. 24 (E.D. Tex.), affirmed without opinion, 466 F. 2d 518 (C.A. 5); but compare *Plaquemines Parish School Board* v. *United States*, 415 F. 2d 817 (C.A. 5).

the federal funds. In the absence of such a showing, the order of the court is within its sound discretion.[6]

Two issues concerning evidentiary rulings are raised in the petitions. Neither issue, in our view, is ripe for review by this Court, since the court of appeals remanded this case for further proceedings in the district court.

First, petitioners in Nos. 74–587 and 74–588 contend that they were denied due process of law because they were precluded from attacking the findings made by the district court in the violations phase of the case, not having been made parties to the litigation until after that aspect of the case had been concluded. But the district court's holding was only that *de jure* segregation within the boundaries of the Indianapolis Public School System was *res judicata* (Pet. App. A36). Other issues addressed in the earlier phase of the case, including the "tipping point" and the action of state and local officials (other than the Indianapolis School Board members), were subject to full inquiry in the later remedy phase (*ibid.*). The issue of *de jure* segregation in the Indianapolis system had been fully litigated, *United States* v. *Board of School Commis-*

[6] The Board also contends (Pet. 29–34) that the court erred by rejecting the plan it offered and appointing commissioners to draw up a plan for the court. It is the obligation of the court, however, to assess the effectiveness of a proposed plan and to ensure that an effective plan is implemented. "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system" (*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16). The Board has not shown that the court abused its discretion in this case.

sioners, 332 F. Supp. 655 (S.D. Ind.), affirmed, 474 F. 2d 81 (C.A. 7), certiorari denied, 413 U.S. 920, and petitioners have not disputed the resolution of that issue. Cf. *Bradley* v. *Milliken,* 484 F. 2d 215, 252 (C.A. 6), reversed on other grounds, No. 73–434, decided July 25, 1974.

Petitioner in No. 74–587 also contends (Pet. 22–25) that it was error to exclude the testimony of Ernest van den Haag and David Armor discounting the educational and sociological value of integration. But this is a case involving *de jure* segregation in public schools. *Brown* v. *Board of Education,* 347 U.S. 483. Desegregation of such a school system has been required under all relevant decisions of this Court from *Brown II* to the present. The proffered testimony could present no pertinent information, and precedent uniformly supports the exclusion of such evidence, unless those decisions were to be re-examined, a course which petitioners have not suggested and which in any event would be inappropriate at this time. See *Stell* v. *Savannah-Chatham,* 318 F. 2d 425 (C.A. 5); *Mapp* v. *Board of Education,* 477 F. 2d 851 (C.A. 6) (*en banc*), certiorari denied, 414 U.S. 1022; *Northcross* v. *Board of Education,* 466 F. 2d 890 (C.A. 6), certiorari denied, 410 U.S. 926.

CONCLUSION

The petitions for writs of certiorari should be denied.

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FEBRUARY 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975